

**CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL**

NO: 500-06-000631-123

**(Class Action)
SUPERIOR COURT**

YANNICK BERTHELET, [REDACTED]
[REDACTED]

Petitioner;

V.

KIA CANADA INC., a legal person established pursuant to the Canada Business Corporations Act, having a principal establishment at 506-6555 boul. Metropolitain, Montreal, Quebec, H1P 3H3;

Defendant;

**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION AND TO
OBTAIN THE STATUS OF REPRESENTATIVE
(Article 1002 C.C.P. and following)**

**TO ONE OF THE HONOURABLE JUSTICES OF THE QUEBEC SUPERIOR
COURT, SITTING IN AND FOR THE DISTRICT OF MONTREAL, THE
PETITIONER STATES AS FOLLOWS:**

General Presentation

The Petitioner wishes to institute a class action on behalf of the following group, of which he is a member (the "Group"):

"All persons and all people in Quebec who purchased or leased one or more of the Defendant's Vehicles model year 2010-2013, namely:

- Forte
- Forte Koup
- Optima
- Optima Hybrid
- Rio

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Gouvernement du Québec
Palais Justice MONTREAL
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- Rondo
- Soul
- Soul Eco
- Sedona
- Sorento
- Sorento 4WD
- Sportage
- Sportage 4WD

and who are not precluded from participating in a class action by virtue of Article 999 of the Quebec Code of Civil Procedure, RSQ, c C-25.”

or such other group definition as may be approved by the Court.

THE PARTIES

The Petitioner

2. The Petitioner, Yannick Berthelet, resides in Val-Belair, Quebec. Mr. Berthelet purchased one the Defendant’s Vehicles, specifically a 2012 Sportage, after receiving information from the Defendants as to the fuel efficiency associated with their vehicles, and specifically the 2012 Sportage, the whole as appears from the contract of sale dated April 3rd, 2012, a copy produced herewith as **Exhibit P-1**. The Petitioner relied upon the Representations of the Defendant to his detriment in making his purchasing decision;
3. The Petitioner is a consumer for the purpose of section 2 of the *Consumer Protection Act*,

The Defendant

4. The Defendant, Kia Canada Inc., is a corporation incorporated pursuant to the laws of Canada, the head offices of which are situated in Markham, Ontario. Kia Canada Inc. is a subsidiary of Kia Motors Co. Ltd. Kia Motors Co. Ltd. is a corporation incorporated pursuant to the laws of the Republic of Korea, the head offices of which is situated in Seoul, Republic of Korea. Kia Canada Inc. which distributes markets and sells throughout Canada Vehicles that are designed and manufactured in the Republic of Korea by Kia Motor Company and certain of its subsidiaries.

5. The Defendant is a merchant for the purpose of Section 2 of the *Consumer Protection Act*.

THE FACTS

6. Prior to and during the time the Vehicles have been for sale in Canada, the Defendant made the Representations, specifically stating that the Vehicles had certain levels of fuel efficiencies. The Representations were designed to, and did, exploit Petitioner's and the Class Members' desire for fuel efficient vehicles, and the Petitioner's and the Class relied upon the Representations to their detriment. Kia undertook a marketing campaign to sell the Vehicles claiming fuel efficiency well beyond the true fuel efficiency of the Vehicles, that is not reached in real-world, normal use. As part of the advertising campaign designed to capitalize on public concern over escalating fuel prices, the Defendant utilized high-impact television, internet, and print advertisements that misleadingly overstated the fuel efficiency of the Vehicles.
7. Canadian motor vehicle fuel consumption testing is conducted in laboratories according to standard testing procedures. Fuel consumption ratings are generated based on fuel consumption values derived from laboratory tests and averaged based on Canadian production volumes. Fuel consumption ratings are then adjusted to account for the difference between controlled test conditions and real-world driving conditions.
8. By way of the Representations, the Defendant misrepresented that the Vehicles had performance characteristics, benefits, and/or qualities that they do not have. The Defendant seriously and significantly overexaggerated the fuel efficiency of the Vehicles. Such false, misleading or deceptive representations deceived or tended to deceive the Petitioner's and the Class Members. The Petitioner's and the Class Members relied on the Representations to their detriment.
9. Kia knew or ought to have known that the Petitioner's and the Class Members would not, and could not reasonably protect their own interests by conducting their own testing and that such purchasers would be unable to receive the benefit misrepresented to them from the Defendant, and further that the Petitioner and the Class Members would rely on the Defendant's misrepresentations to their detriment.
10. The Representations were made for the purpose of promoting, directly or indirectly, the sale of the Defendant's Vehicles or for the purpose of promoting, directly or indirectly, other business interests of the Defendant. The Representations were made knowingly or recklessly. The Representations were made to the public, to the Petitioner, and to the

Class Members. The Representations were false and/or misleading in a material respect, namely as to the actual fuel efficiency of the Defendant's Vehicles.

11. Kia has received a large number of complaints regarding the discrepancy between the advertised and actual fuel efficiency of their Vehicles.
12. The Petitioner and Class Members suffered loss or damage as a result of the Defendant's conduct by having to pay for more fuel than anticipated. Further, the Petitioner and Class Members were damaged by the Representations in as much as the Defendant's broad dissemination of inflated fuel efficiency caused the Defendant's Vehicles to be purchased and sold at prices higher than those at which such Vehicles would have been purchased and sold had the Defendant disseminated accurate fuel efficiency information with respect to their Vehicles.
13. On November 2, 2012, Kia along with Hyundai Auto Canada Corp., announced it had overstated the fuel consumption ratings for approximately 172,000 vehicles sold in Canada since 2010, citing an investigation by the U.S. Environmental Protection Agency ("EPA"). Kia said they would lower the kilometers-per-litre estimates on most of their 2012 and 2013 vehicles as a result of the EPA finding and that they would compensate buyers for the difference.
14. A Kia spokesperson, Dr. W. C. Yang, Chief Technology Officer of Hyundai/Kia research and development said: "I sincerely apologize to all affected Hyundai and Kia customers, and I regret these errors occurred."
15. Kia also announced a compensation plan. The proposed compensation plan consists of providing consumers with a pre-paid credit card with an amount reflecting the difference in fuel consumption, based on the average fuel price in a given consumer's region and their own actual kilometers driven, along with an additional 15 percent. The reimbursement is available every year, for as long the consumer owns the vehicle. Prior owners of affected vehicles will also be reimbursed using the same formula.
16. The proposed compensation plan fails to address the difference in value and/or purchase price of the Vehicles in question.

CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

17. The composition of the Group makes the application of article 59 or 67 C.C.P. impracticable for the following reasons:

- The number of persons included in the group is estimated to be several thousand;
 - The names and addresses of persons included in the group are not known to the Petitioner (but are likely to be known to Defendant);
 - All the facts alleged in the preceding paragraphs make the application of articles 59 or 67 C.C.P. impossible.
18. The claims of the Members of the Group raise identical, similar or related questions of fact or law, namely:
- (a) Did the Defendant make Representations that were false, misleading and contrary to s. 52(1) of the *Competition Act*?
 - (b) Did the Defendant make Representations that were in violation of s. 41, 42, 216, 219, 221, 253 and 272 of the *Consumer Protection Act*?
 - (c) Did the Defendant make Representations that were a fault in violation of the general private law duty of diligence owed to the Petitioner and the Members in the circumstances accordingly with article 1457 of the *Civil Code of Quebec*?
 - (d) What prejudice was sustained by the Petitioner and the Members of the Group as a result of the Defendant's Representations and fault?
 - (e) Is the Defendant responsible for the damages sustained by each of the Members?
 - (f) Did the Defendant benefit financially through the sale of its Vehicles as a result of the misleading Representations?
 - (g) Are the Members of the Group entitled to punitive damages?
 - (h) Is a permanent injunction required restraining the Defendant from continuing any actions taken by it in contravention of the *Consumer Protection Act*, the *Competition Act* and the *Civil Code of Quebec*?
19. The interests of justice weigh in favour of this motion being granted in accordance with its conclusions.

NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

20. The action that the Petitioner wishes to institute for the benefit of the Members of the Group is an action in damages and for injunctive relief;
21. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT the Petitioner's action against the Defendant;

DECLARE that the Defendant made misleading Representations relating to the fuel consumption of the named Vehicles;

DECLARE that the misleading Representations constitute a fault;

DECLARE that the Defendant is liable for the misleading Representations;

CONDEMN the Defendant to pay to the Members of the Group damages in the amount of \$10,000,000 for misrepresentations, or such other sum as this Court finds appropriate for all monetary losses;

CONDEMN the Defendant to pay to the Members of the Group damages in the amount of \$2,000,000 pursuant to s. 36 of the *Competition Act* and to s. 272 of the *Consumer Protection Act*, or such other sum as this Court finds appropriate for all monetary losses;

CONDEMN the Defendant to pay to the Members of the Group damages in the amount of \$2,000,000 for punitive damages, or such other sum as this Court finds appropriate for all monetary losses;

DECLARE that any funds received by the Defendant through the sale of its Vehicles as a result of the Representations are held In Trust for the benefit of the Petitioner and Class Members;

GRANT a permanent injunction restraining the Defendant from continuing any actions taken by it in contravention of the *Consumer Protection Act*, the *Competition Act* and the *Civil Code of Quebec*;

GRANT the class action of the Petitioner on behalf of all the Members of the Group;

ORDER collective recovery in accordance with articles 1031 to 1036 C.C.P.;

ORDER the treatment of individual claims of each Member of the Group in accordance with articles 1037 to 1040 C.C.P.;

THE WHOLE with interest and additional indemnity provided for in the *Civil Code of Quebec* and with full costs and expenses, including expert fees, notice fees and fees relating to administering the plan of distribution of the recovery in this action;

22. The Petitioner suggests that this class action be exercised before the Superior Court in the District of Montreal for the following reasons:

- The Class Members reside everywhere in the Province of Quebec;
- The Defendant has a place of business in Montreal;
- The Petitioner's lawyers have an office in the District of Montreal.

23. The Petitioner, who is requesting to obtain the status of representative, will fairly and adequately protect and represent the interest of the Members of the Group for the following reasons:

- He understands the nature of the action;
- He is available to dedicate the time necessary for an action to collaborate with Members of the Group; and
- His interests are not antagonistic to those of other Members of the Group.

24. The present motion is well-founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

ASCRIBE the Petitioner the status of representative of the persons included in the group herein described as:

“All persons and all people in Quebec who purchased or leased one or more of the Defendant’s Vehicles model year 2010-2013, namely:

- Forte
- Forte Koup
- Optima
- Optima Hybrid
- Rio
- Rondo
- Soul
- Soul Eco
- Sedona
- Sorento
- Sorento 4WD
- Sportage
- Sportage 4WD

and who are not precluded from participating in a class action by virtue of Article 999 of the Quebec Code of Civil Procedure, RSQ, c C-25.”

or such other group definition as may be approved by the Court.

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a) Did the Defendant make Representations that were false, misleading and contrary to s. 52(1) of the *Competition Act*?
- b) Did the Defendant make Representations that were in violation of s. 41, 42, 216, 219, 221, 253 and 272 of the *Consumer Protection Act*?
- c) Did the Defendant make Representations that were a fault in violation of the general private law duty of diligence owed to the Petitioner and the Members in the circumstances accordingly with article 1457 of the *Civil Code of Quebec*?
- d) What prejudice was sustained by the Petitioner and the Members of the Group as a result of the Defendant’s Representations and fault?

- e) Is the Defendant responsible for the damages sustained by each of the Members?
- f) Did the Defendant benefit financially through the sale of its Vehicles as a result of the misleading Representations?
- g) Are the Members of the Group entitled to punitive damages?
- h) Is a permanent injunction required restraining the Defendant from continuing any actions taken by it in contravention of the *Consumer Protection Act*, the *Competition Act* and the *Civil Code of Quebec*?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the Petitioner's action against the Defendant;

DECLARE that the Defendant made misleading Representations relating to the fuel consumption of the named Vehicles;

DECLARE that the misleading Representations constitute a fault;

DECLARE that the Defendant is liable for the misleading Representations;

CONDEMN the Defendant to pay to the Members of the Group damages in the amount of \$10,000,000 for misrepresentations, or such other sum as this Court finds appropriate for all monetary losses;

CONDEMN the Defendant to pay to the Members of the Group damages in the amount of \$2,000,000 pursuant to s. 36 of the *Competition Act* and to s. 272 of the *Consumer Protection Act*, or such other sum as this Court finds appropriate for all monetary losses;

CONDEMN the Defendant to pay to the Members of the Group damages in the amount of \$2,000,000 for punitive damages, or such other sum as this Court finds appropriate for all monetary losses;

DECLARE that any funds received by the Defendant through the sale of its Vehicles as a result of the Representations are held in trust for the benefit of the Petitioner and Class Members;

GRANT a permanent injunction restraining the Defendant from continuing any actions taken by it in contravention of the *Consumer Protection Act*, the *Competition Act* and the *Civil Code of Quebec*;

GRANT the class action of the Petitioner on behalf of all the Members of the Group;

ORDER collective recovery in accordance with articles 1031 to 1036 C.C.P.;

ORDER the treatment of individual claims of each Member of the Group in accordance with articles 1037 to 1040 C.C.P.;

THE WHOLE with interest and additional indemnity provided for in the *Civil Code of Quebec* and with full costs and expenses including expert fees and notice fees and fees relating to administering the plan of distribution of the recovery in this action;


DECLARE that all Members of the Group that have not requested their exclusion from the Group in the prescribed delay to be bound by any judgement to be rendered on the class action to be instituted;

FIX the delay of exclusion at 30 days from the date of the publication of the notice to the Members of the Group;

ORDER the publication of a notice to the Members of the Group in accordance with article 1006 C.C.P.;

THE WHOLE with costs, including the costs of all publications of notices.

Montreal, November 5th, 2012


SISKINDS, DESMEULES, AVOCATS
(Me Samy Elnemr)
Lawyer for the Petitioner

SCHEDULE 1

NOTICE TO DEFENDANT

Take notice that the Petitioner has filed this action or application in the office of the Superior Court of the judicial district of Montreal.

To file an answer to this action or application, you must first file an appearance, personally or by advocate, at the courthouse of Montreal located at 1, Notre-Dame East, Montreal, Quebec, H2Y 1B6 within 10 days of service of this motion.

If you fail to file an appearance within the time limit indicated, a judgment by default may be rendered against you without further notice upon the expiry of the 10 day period.

If you file an appearance, the action or application will be presented before the court on January 15th, 2013 at 9h00 a.m. On that date, the court may exercise such powers as are necessary to ensure the orderly progress of the proceeding or the court may hear the case, unless you have made a written agreement with the Petitioner or the Petitioner's advocate on a timetable for the orderly progress of the proceeding. The timetable must be filed in the office of the court.

These exhibits are available on request.

Montreal, November 5th, 2012

Siskinds, Desmeules, Avocats
SISKINDS, DESMEULES, AVOCATS
(Me Samy Elnemr)
Lawyers for the Petitioner

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
NO:

(Class Action)
SUPERIOR COURT

YANNICK BERTHELET, [REDACTED]
[REDACTED]
[REDACTED]

Petitioner;

V.

KIA CANADA INC., a legal person
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Business Corporations Act, having a
principal establishment at 506-6555
boul. Metropolitain, Montreal, Quebec,
H1P 3H3;

Defendant;

LIST OF EXHIBIT

Exhibit P-1: Contract of sale for a Kia Sportage 2012, dated April 3rd, 2012;

Montreal, November 5th, 2012

Siskinds, Desmeules, Avocats
SISKINDS, DESMEULES, S.E.N.C.R.L.
Lawyer for the Petitioner

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No: 500-06-000631-123
SUPERIOR COURT (Class Action)
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YANNICK BERTHELET

Petitioner

V.

KIA CANADA INC.

Defendant

**MOTION TO AUTHORIZE THE BRINGING OF A
CLASS ACTION AND TO OBTAIN THE STATUS
OF REPRESENTATIVE
(Article 1002 C.C.P. and following)**

Me **Samy Elnemr** BS2497
N/dossier: 67-120

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